

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ROGER EMMETT CLINE

Petitioner,

v.

CIVIL ACTION NO. 1:06CV123  
(Judge Keeley)

WILLIAM M. FOX, Warden,

Respondent.

ORDER AFFIRMING THE MAGISTRATE'S REPORT AND RECOMMENDATION,  
DENYING AND DISMISSING WITH PREJUDICE PETITIONER'S  
28 U.S.C. § 2254 PETITION AND GRANTING RESPONDENT'S  
MOTION TO DISMISS WITH PREJUDICE

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On December 4, 2003, the petitioner filed a petition pursuant to 42 U.S.C. 2254, which was assigned case number 1:03cv268. This Court dismissed the petition as untimely by order entered May 23, 2005.

The petitioner filed his instant petition on August 17, 2006. Pursuant to 28 U.S.C. 2244(b)(3), prior to filing a successive petition with the district court, a petitioner must seek an order from the court of appeals authorizing the district court to consider the application. In order for a petition to be considered successive, the first petition must have been dismissed on the merits. Harvey v. Horan, 278 F.3d 370 (4<sup>th</sup> Cir. 2002). Although the petitioner's first § 2254 petition was dismissed on statute of limitations grounds, such a dismissal is akin to a dismissal on the merits, and thus bars a subsequent motion without leave of the Fourth Circuit. See Shoup v. Bell & Howell Co., 872 F.2d 1178 (4<sup>th</sup>

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Cir. 1989). On September 12, 2007, the Fourth Circuit denied the petitioner's motion for authorization to file a successive petition. Therefore, because the petitioner has failed to obtain authorization from the Fourth Circuit to file his successive § 2254 motion in this Court, this Court is without authority to hear his successive motion.

For the reasons outlined above, the Court **AFFIRMS** the Magistrate's Report and Recommendation (Doc. No. 26), **DENIES** and **DISMISSES WITH PREJUDICE** the petitioner's 28 U.S.C. § 2254 petition (Doc. No. 1), **GRANTS** the respondent's Motion to Dismiss with Prejudice. (Doc. No. 18), and orders that this case be **STRICKEN** from this Court's docket.

The Clerk is directed to file this Order electronically and mail a copy of this Order to the pro se petitioner and all appropriate agencies.

DATED: September 24, 2007

/s/ Irene M. Keeley  
IRENE M. KEELEY  
UNITED STATES DISTRICT JUDGE